



Public Availability of Inoperative Agency Guidance Documents

Committee on Regulation

Proposed Recommendation for Committee | October 20, 2021

Preamble to include the following subjects:

- Explanation of the term “inoperative guidance document.”
- Description of statutory and regulatory requirements, as well as general guidance from the Office of Management and Budget, that govern the posting, organizing, and labeling of inoperative guidance documents.
- Description of Recommendation 2019-3 and other Administrative Conference recommendations that speak to public availability of agency materials.
- Description of current agency practices regarding posting, organizing, and labeling inoperative guidance documents on agency websites.
- Description of means agencies use outside of their websites to alert the public to the availability and fact of rescission inoperative guidance documents.

Commented [TR1]: Preamble to be circulated to Committee before the November 3 meeting.

RECOMMENDATION

Deciding Which Types of Inoperative Guidance Documents to Make Publicly Available on Agencies’ Websites

Commented [TR2]: For Committee discussion: should agencies apply the below recommendations solely on a *prospective* basis: that is, to guidance documents that become inoperative in the future? Or should agencies *also* apply them retrospectively: that is, to guidance documents that are already inoperative?

1. Agencies should determine which types of guidance documents that have been rescinded, superseded, or have fallen into disuse (collectively “inoperative guidance documents”) should be made publicly available on their websites.
2. In determining which types of inoperative guidance documents to make publicly available on their websites, agencies should consider, among others, the following factors:

Commented [TR3]: For Committee discussion: if an agency did not post an *operative* guidance document, might there be any circumstances under which the agency should post the *inoperative* version of that guidance document? How, if at all, should the Recommendation address this question?



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 7 a. Whether the inoperative guidance documents appear to be of interest to the
8 public, as indicated by many unique page views or downloads of the documents
9 (either while the documents were operative or while they were inoperative but
10 already made available) or by many unique inquiries about the documents;
- 11 b. Whether the inoperative guidance documents, while operative, generated reliance
12 interests, as indicated by frequent citations of the operative versions of the
13 documents in regulations, briefs, or news sources, or substantial public feedback;
14 or
- 15 c. Whether the inoperative guidance documents, while operative, dealt with issues of
16 widespread significance or controversial matters, as indicated by submission to
17 the Office of Information and Regulatory Affairs of the operative versions of the
18 guidance documents or publication in the agencies' *Unified Agenda* of the same.

Establishing Written Procedures for Inoperative Guidance Documents

- 19 3. Agencies should develop and publish on their websites written procedures governing the
20 storage and display of those inoperative guidance documents the agencies have
21 determined should be made publicly available on their websites. These procedures should
22 either be part of their general procedures governing storage and display of their guidance
23 documents or can be stand-alone procedures. At a minimum, these procedures should:
- 24 a. Provide for how inoperative guidance documents are to be compiled and
25 organized on agencies' websites to make it easy for the public to find the
26 inoperative guidance documents in which they are interested; and
- 27 b. Specify the labels and explanations agencies will use to ensure the public can
28 readily understand the significance and effect of inoperative guidance documents.

Organizing and Labeling Inoperative Guidance Documents on Agencies' Websites

- 29 4. Agencies should organize inoperative guidance documents on their websites to make it
30 easy for the public to find the inoperative guidance documents in which they are



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 31 interested. Among the options agencies should consider, alone or in tandem with one
32 another, are:
- 33 a. Creating a table that is indexed, tagged, or sortable, and is dedicated exclusively
34 to housing inoperative guidance documents, with links to such documents;
 - 35 b. Providing a search function that uncovers inoperative guidance documents; and
 - 36 c. Using a method, such as a pull-down menu, that allows the public to view
37 inoperative guidance documents at different points in time, with an indication on
38 all inoperative versions of the documents that they are inoperative.
- 39 5. Agencies should label inoperative guidance documents on their websites to ensure that
40 the public can readily understand the significance and effect of those guidance
41 documents. Among the labeling methods agencies should consider, alone or in tandem
42 with one another, are:
- 43 a. Including a watermark that reads “rescinded,” or uses similar terminology, across
44 each page of inoperative guidance documents;
 - 45 b. Including prominent stamps at the top of inoperative guidance documents noting
46 that the documents are rescinded and indicating the dates of rescission;
 - 47 c. Publishing notices of rescission on agencies’ websites and providing links to the
48 notices in inoperative guidance documents; and
 - 49 d. Including the word “rescinded,” or similar terminology, within a table in which
50 links to inoperative guidance documents appear.

Using Means Other Than Agencies’ Websites to Notify the Public of the Rescission and Posting of Inoperative Guidance Documents

- 51 6. Agencies should consider using the following methods, alone or in conjunction with one
52 another, to notify the public when they have rescinded guidance documents and to notify
53 the public that inoperative guidance documents are available on their websites:
- 54 a. Publishing such notifications in the *Federal Register*, even when not required to
55 do so by law;



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 56 b. Sending such notifications over listservs that consist of interested members of the
57 public;
58 c. Conveying such notifications during virtual meetings, in-person meetings, or
59 webinars;
60 d. Conveying such notifications through press releases; and
61 e. Using or developing subscription services to allow the public to subscribe to such
62 notifications.